No. 92-7217

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DEE FARMER,
Petitioner,
v.
EDWARD BRENNAN, WARDEN, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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I. THE LACK OF DISAGREEMENT BETWEEN THE PARTIES ON SEVERAL ISSUES CONSIDERABLY NARROWS THE ISSUE PRESENTED IN THIS CASE

The respondents' brief makes several implicit and explicit concessions that substantially narrow the issue presented in this case:

(1) The most important concession, which respondents acknowledge may require remand in this case (Respondents' Brief at 10, 29), is that the Seventh Circuit applied an unduly restrictive standard of "deliberate indifference." The Seventh Circuit criminal recklessness standard provides that "punishment implies at a minimum *actual knowledge of impeding harm easily preventable*, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." *Duckworth v. Franzen*, 780 F.2d 645, 653 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) (emphasis added) [hereinafter *Franzen*]. The respondents retreat from essentially every aspect of this standard. First, although respondents ask the Court to adopt the Seventh Circuit's requirement that a plaintiff prove that a defendant had actual knowledge of an unreasonable risk, respondents concede that the standard may be satisfied by circumstantial evidence, a form of proof the Seventh Circuit has not recognized.[1] Second, respondents dispense with the requirement that the harm be "impending."[2] Finally, respondents substitute "readily preventable" for "easily preventable."[3]

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[1] *See* discussion *infra* at points 3 and 5.

[2] This concession is compelled by this Court's decision in *Helling v. McKinney*, 113 S.Ct. 2475, 2480 (1993).

[3] For the reasons given in petitioner's opening brief, neither formulation is correct. (*See* Petitioner's Brief at 35 & n.53.) In *Helling*, 113 S.Ct. at 2480, this Court stated that a prisoner "could successfully complain about demonstrably unsafe drinking

Indeed, neither respondents nor their amici respond to petitioner's argument that the Seventh Circuit standard is so unduly restrictive that it is essentially indistinguishable from the "malicious and sadistic" standard [4] that this Court has contrasted to the deliberate indifference standard. *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986); *Wilson v. Seiter*, 111 S.Ct. 2321, 2326-27 (1991).[5]

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water without waiting for an attack of dysentery." Even if it were cumbersome and expensive for a prison to correct such a problem, it would nevertheless be required to do so.

[4] The Seventh Circuit has implicitly equated its deliberate indifference standard with a malice standard. *See Duckworth v. Franzen*, 780 F.2d 645, 654 (7th Cir. 1985) (defendant's conduct not deliberately indifferent when not "willful and malicious"). The harshness of the Seventh Circuit standard, as well as its congruence with the *Whitley* malice standard, was illustrated in a recent Seventh Circuit case:

> The subjective component of unconstitutional "punishment" is the *intent* with which the acts or practices constituting the alleged punishment are inflicted. The minimum intent required is "*actual* knowledge of *impending* harm *easily* preventable." A failure of prison officials to act in such circumstances suggests that the officials *actually want the prisoner to suffer the harm.*

Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992) (last emphasis added) (citation omitted).

[5] Respondents' presentation of the criminal recklessness standard is rife with inconsistencies. They cite with apparent approval the language from *Franzen* quoted above in the text and rely on other Seventh Circuit cases to the same effect. However, as discussed in the text, their own characterization of the standard considerably softens the Seventh Circuit formulation without acknowledging the differences. Similarly, they obscure the harshness of the Seventh Circuit criminal law standard by citing cases adopting that standard and cases rejecting it more or less interchangeably. For example, *Berry v. City of Muskogee, Okla.*, 900 F.2d 1489, 1495 (10th Cir. 1990), cited by respondents in the same paragraph on page 16 of their brief as *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992), and *Franzen*, "reject[s *Franzen*'s] conclusion that anything less than criminal recklessness by a jailer is per se insufficient to give rise to Eighth Amendment protection." (Footnote omitted).

(2) Closely related to respondents' concession regarding the harshness of the Seventh Circuit standard is their agreement that "deliberate indifference" in the Eighth Amendment context is consistent with the meaning of that term adopted in *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) [hereinafter *Canton*]. (Petitioner's Brief *passim*; Respondents' Brief at 10, 23-24 (arguing that the standard they urge is consistent with *Canton*)).

(3) A consequence of respondents' concession regarding the applicability of *Canton* is their acknowledgement that a plaintiff may establish deliberate indifference by proving that officials "must have had knowledge of a risk because it was 'obvious.'" (Respondents' Brief at 9-10.) A logical extension of this position is that once a plaintiff produces sufficient evidence that a risk was obvious, the case, as a matter of law, will withstand summary judgment and *must* go to the trier of fact. In contrast, under the Seventh Circuit standard that the respondents no longer defend, proof of an obvious risk that the defendant should have known about will not, by itself, even allow the plaintiff to present the case to the jury. *See infra* note 6.

(4) Another consequence of respondents' concession regarding the applicability of *Canton* is their acknowledgement that deliberate indifference may exist where a *class* of prisoners, as well as where a specific person, is subject to an unreasonable risk. (Respondents' Brief at 15.)

(5) Finally, contrary to the Seventh Circuit's position in *McGill* v. *Duckworth*, 944 F.2d 344, 349 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992) [hereinafter *McGill*],[6] respondents acknowledge that "deliberate in-

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[6] In *McGill*, the court of appeals considered a jury instruction stating that officials were deliberately indifferent if they should

difference" does not necessarily require that a prisoner prove that he or she told prison officials of the threat of harm. (Respondents' Brief at 4.)

The respondents' concessions leave only the following disagreement[7] for this Court: Under the respondents' proposed standard, a plaintiff who has proven that the existence of an unreasonable risk was obvious has demonstrated sufficient circumstantial evidence of defendants' actual knowledge to escape summary judgment. This is a significant improvement over the test utilized by the court below. However, under respondents' proposal, the trier of fact still must determine that the defendant had actual knowledge of the risk in order for plaintiff to prevail. The requirement of proving actual knowledge is where the parties diverge. Petitioner's position is that the deliberate indifference standard set forth in *Canton* is met once the

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have known of the risk. The jury reached a verdict for the prisoner. On appeal, the court of appeals not only reversed the jury verdict, but held that as a matter of law the evidence would not support a judgment for plaintiff. *McGill*, 944 F.2d at 349. Indeed, the court stated that prisoner assault cases should be dismissed at the pleading stage if the prisoner has not alleged that he or she told officials about the threat. *Id.* Neither *McGill* nor *Franzen* suggests that the existence of an obvious risk can be offered as circumstantial evidence of actual knowledge.

[7] The other issues on which the parties agree are the following:

(1) "Willful blindness" is a species of actual knowledge that satisfies the "deliberate indifference" standard. (Respondents' Brief at 16, 19 n.9.)

(2) Liability cannot be established where there is an unreasonable risk of harm present in a facility but the risk is neither known nor obvious to prison officials. Such a circumstance would exist, for example, where the population is in a constant state of terror but the intimidation of victims is so effective that they do not complain and nothing else alerts officials to the situation.

(3) The objective aspect of a prisoner-on-prisoner assault case is governed by *Helling v. McKinney*. (Respondents' Brief at 7-8, 13-14.)

plaintiff has proven that the defendants knew facts which rendered an unreasonable risk obvious; under such circumstances, the defendant should have known of the risk and will be charged with such knowledge as a matter of law.

Despite the significant narrowing of the parties' differences, the Court's ruling on this remaining issue is of critical importance. As noted, under petitioner's standard, knowledge will be imputed where a plaintiff has proven that the existence of an unreasonable risk was obvious. Evidence of obviousness is readily available to both sides. Under the respondents' proposed standard, however, plaintiff's proof that the existence of an unreasonable risk was obvious is only circumstantial evidence of actual knowledge. Confronted with that circumstantial evidence, defendants will frequently present direct, albeit self-serving, testimony denying actual knowledge of the risk. This unequal access to direct evidence will often result in triers of fact failing to find deliberate indifference even when the defendants had actual knowledge of the risk.

II. THE DELIBERATE INDIFFERENCE STANDARD ENUNCIATED IN *CANTON* AND *WILSON* DOES NOT REQUIRE PRISONERS TO INFORM OFFICIALS OF OBVIOUS RISKS

Wilson v. Seiter, 111 S.Ct. 2321 (1991), held that the subjective component of an Eighth Amendment violation in the context of prisoner-on-prisoner assaults is met by a showing of "deliberate indifference," a term previously defined in *Canton*, 489 U.S. 378. While respondents seem to concede the applicability of *Canton*, their interpretation of the case eviscerates the Court's holding that disregard of obvious risks amounts to deliberate indifference. The respondents' reading of *Canton* substitutes the word "known" for the word "obvious." When this Court in *Canton* used the term "obvious" to define deliberate indifference, it meant it. Respondents' reading of *Canton* would mean that, although *Canton* never used

the words "actual knowledge," it was *sub silentio* imposing an "actual knowledge" requirement on plaintiffs. Because the nature and level of a plaintiff's proof was the central issue in the case, this reading of *Canton* must be wrong.

Justice O'Connor's concurring and dissenting opinion is also flatly inconsistent with respondents' argument. That opinion stated that the deliberate indifference standard is met "[w]here a § 1983 plaintiff can establish that the facts available to city policymakers put them on *actual or constructive notice* that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens. . . ." *Canton*, 489 U.S. at 396 (emphasis added). Black's Law Dictionary defines "constructive notice" as follows: "Such notice as is implied or imputed by law. . . . Notice with which a person is charged by reason of the notorious nature of the thing to be noticed, as contrasted with actual notice of such thing." Black's Law Dictionary 165 (5th ed. 1983). Thus, when the plaintiff has proven an "obvious" or "notorious" risk, actual knowledge of the risk is imputed to the defendant by operation of law. Accordingly, contrary to respondents' position, once an obvious risk is established, the trier of fact must find actual knowledge.

Indeed, the specific hypothetical used in *Canton* to illustrate the deliberate indifference standard, the need to train officers in the use of deadly force, did not involve actual knowledge of the risk of harm. 489 U.S. at 390 n.10. The Court's example assumed that city policymakers knew the following two facts: (1) police officers will need to use force to arrest fleeing felons, and (2) police officers have been equipped with guns. After these facts were shown, the plaintiff was not required to prove that city policymakers had actual knowledge of the risk that untrained police officers would shoot people without justification because the underlying facts, which were known to city policymakers, rendered that risk "obvious." *Id.*

Similarly, in this case, petitioner will be able to show that prison officials knew that (1) she was a transsexual; (2) the penitentiary in which she was to be housed was a maximum security facility with frequent sexual assaults; and (3) transsexuals "present a unique management problem in a correctional setting." (Respondents' Answer, J.A. 71, 74 ¶ 28.) Indeed, petitioner alleged that all respondents were aware of *Farmer v. Carlson*, 685 F. Supp. 1335 (M.D. Pa. 1988), in which the federal court relied on a declaration by one of the respondents to find that placing her in general population at a maximum security facility would pose a threat to her. (*See* Complaint J.A. 57-58, ¶¶ 51, 55.) As in *Canton*, these underlying facts, when shown to be known to prison officials, at a minimum raise a factual controversy as to whether it created an obvious and unreasonable risk to place petitioner in general population at USP-Terre Haute.[8]

The parallel between *Canton* and this case occurs when a prison official or a policymaker knows facts that render obvious an unreasonable risk of harm, and does not take action in response to that risk. In these circumstances, because the officials know the underlying facts, knowledge of the risk is imputed to them and it is immaterial whether they actually recognized it. In either case, deliberate indifference has been established, and thus the subjective component of the Eighth Amendment has been satisfied.[9]

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[8] Although respondents argue that the standard they urge is consistent with *Canton*, they also argue that the *Canton* analysis is not "wholly applicable" to this case because, in *Canton*, the underlying facts which gave rise to the risk of harm were known to the defendants, whereas, in this case, "the prison officials [we]re unaware of the facts establishing the risk in the first place." (Respondents' Brief at 10, 23-25.) As discussed in the text, this is plainly wrong.

[9] Deliberate indifference, as defined in *Canton*, is the least culpable state of mind that the law places within the general category of "intentional" states. (*See* Petitioner's Brief at 20-21.) Indeed *Canton* and *Wilson* both adopted the deliberate indifference standard precisely because it is the least culpable state of mind con-

This standard is fully consistent with *Canton* and *Wilson*. As the Third Circuit explained in *Young v. Quinlan*, 960 F.2d 351 (3d Cir. 1992):

> "should have known[]" [d]oes not refer to a failure to note a risk that would be perceived with the use of ordinary prudence. It connotes something more than a negligent failure to appreciate the risk . . . , though something less than subjective appreciation of that risk. The strong likelihood of [harm] must be so obvious that a lay person would easily recognize the necessity for preventative action; the risk of . . . injury must be not only great, but also sufficiently apparent that a lay custodian's failure to appreciate it evidences an absence of any concern for the welfare of his or her charges.

Young v. Quinlan, 960 F.2d at 361 (internal quotation marks and citation omitted).[10]

Whether petitioner's placement in general population at USP-Terre Haute created an obvious risk is a factual question requiring development upon remand. If it is found that respondents knew facts that rendered the risk obvious —thereby meeting the subjective component of an Eighth Amendment violation as enunciated in *Wilson*—they would be charged with knowledge of the heightened risk to petitioner. This is the thrust of *Canton*: where the risk is obvious, disregarding that risk is construed as a deliberate choice on the part of prison officials or policymakers and, therefore, a violation of the Eighth Amendment.

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sistent with a deliberate choice or intent. Respondents concede that the *Canton* standard is consistent with the mental element standard of *Wilson*. (Respondents' Brief at 24-25.)

[10] Respondents' brief repeatedly suggests that petitioner is asking this Court to adopt a tort "negligence" standard. (Respondents' Brief at 9, 20-22.) Petitioner's Brief at 20, however, explicitly disavows a negligence standard, as do *Canton* and *Young v. Quinlan*, cases that set forth the deliberate indifference standard petitioner urges.

III. THE CRIMINAL "ACTUAL KNOWLEDGE" STANDARD SHIFTS THE DUTY OF MONITORING PRISONER SAFETY FROM OFFICIALS TO THE VERY PRISONERS THEY ARE CHARGED WITH PROTECTING

The narrow disagreement between the parties pertains to the circumstance in which a defendant-official fails to recognize an obvious and unreasonable risk. The "reasonable safety" guaranteed to prisoners by the Eighth Amendment requires constitutional protection for prisoners in such circumstances. Unlike the "negative liberties" embodied in most of the Bill of Rights, the Eighth Amendment carriers with it affirmative obligations. Those obligations—to provide "basic human needs, such as food, clothing, shelter, medical care, and reasonable safety"—are owed only to persons restrained by the state, and they arise precisely from the limitations that the state has imposed on those persons' freedom to act in their own behalf. *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 200 (1989). To hold that a person wholly incapacitated by the state is not entitled to protection from such obvious dangers would disregard the realities of incarceration and the restrictions on prisoners' ability to avoid violence or to defend themselves from it. In the context of prison life, a standard so undemanding of prison officials simply does not provide for "reasonable safety."[11] It would be an odd affirmative constitutional

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[11] The restraints of penal confinement are extreme. Prisoners must live where they are told, work when and where they are told, go to meals and other daily activities when and where they are told, and associate with those who, also by command of the state, are present in those living, working, and other environments. Prisoners have no option to move, to stay home from work, or to change their routine to avoid dangers that they know or suspect. They are forbidden to arm themselves and may be harshly disciplined for self-defense. In these respects, they are completely dependent on the good will and competence of the state and its employees, not merely to maintain them (as by provision of food, clothing and shelter) but to protect their health, safety and lives from the dangers of the prison environment.

duty if an official could violate the duty only by possessing a state of mind equivalent to that required for second degree murder. *Cf. Franzen*, 780 F.2d at 652.

Moreover, the respondents' standard shifts this affirmative duty of monitoring prisoner safety from officials to the very prisoners who are at risk. It is petitioner's position that her *status* as a young, slight, transsexual in the general population of this maximum security penitentiary created an obvious, unreasonable risk of harm. The respondents purport to repudiate the Seventh Circuit requirement of actual notice.[12] However, because it does not charge officials with knowledge of obvious risks, respondents' standard would still require a vulnerable prisoner who is incarcerated and supervised by officials who do not recognize obvious risks to keep the officials informed of such risks. Such a requirement is impractical because the staff are necessarily likely to have more knowledge of specific risk factors, such as the prevalence of assault, than will any individual prisoner. One way

[12] Although respondents concede that a notice requirement will not apply in *all* circumstances, they emphasize in their Statement of Facts that petitioner did not affirmatively *request* administrative segregation at Terre Haute. (Respondents' Brief at 4.) This fact does not carry the importance suggested by respondents. Petitioner, who was new to Terre Haute, necessarily had less information about her risk in general population than did respondents. Moreover, a notice requirement fails to take into account the realities of prison life. Attempting to notify prison officials of a threat in itself may substantially increase the danger to the prisoner by inviting retaliation. *See* Scott Rauser, Comment, *Prisons Are Dangerous Places: Criminal Recklessness as the Eighth Amendment Standard of Liability in McGill v. Duckworth*, 78 Minn. L. Rev. 165, 188-90 (1993); *cf. Redman v. County of San Diego*, 942 F.2d 1435, 1438 (9th Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 972 (1992) (Prisoner plaintiff reported sexual threats to family member, who informed staff. Staff then questioned plaintiff in presence of prisoner who had raped him). Moreover, some vulnerable prisoners may lack the mental capacity to complain to prison officials. *See, e.g., Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir.), *cert. denied*, 488 U.S. 823 (1988).

to illustrate the absurdity of the respondents' position is to imagine such a conversation between petitioner and respondents prior to her placement in general population:

> Petitioner: I am a transsexual.
>
> Respondents: We know that.
>
> Petitioner: I am 25 years old and of slight build.
>
> Respondents: We know that.
>
> Petitioner: USP-Terre Haute is a maximum security facility that houses extremely violent and aggressive individuals.
>
> Respondents: We know that.
>
> Petitioner: Well then, you know that, because of this, I am at risk of harm if I am placed in the general population.
>
> Respondents: Why?
>
> Petitioner: Because I'm a young, slight, transsexual and Terre Haute is a maximum security facility.[13]

The same ridiculous conversation would be required of informants, police officers, and other prisoners who are *obviously* at risk of harm by virtue of their status and who are unlucky enough to be housed by prison officials who fail to recognize obvious risks. Similarly, the respondents' standard would suggest that prisoners who are about to be issued contaminated blankets, when prison officials *know* that the blankets are contaminated, must nevertheless *tell* prison officials that issuance of the blankets is likely to result in harm. In these examples, both the prisoner and the prison officials know the underlying facts which give rise to the risk, and the prisoner's failure to complain cannot excuse the officials' failure to act. A contrary ruling would be ludicrous, and is certainly not constitutionally required.

[13] Of course, in this case petitioner also alleged that respondents had additional knowledge of the risk. *See* discussion *infra* Section V.

IV. THE ARGUMENTS OF STATE AMICI ARE UNPERSUASIVE

State amici argue that petitioner urges a *per se* rule that a transsexual cannot be confined in general population. (Amici Brief at 6-7.) This is not her position. Rather, petitioner seeks an opportunity to prove that it was deliberate indifference in this case to fail to protect her in this maximum security facility. Amici's argument is equivalent to arguing that *Helling v. McKinney*, 113 S.Ct. 2475 (1993), stands for a *per se* rule that exposure to environmental tobacco smoke violates the Eighth Amendment. Rather, *Helling* granted the plaintiff an opportunity to prove a constitutional violation under the standard articulated in the case. In this case, the petitioner was never given an opportunity to develop the record as to whether or not confining her in general population at Terre Haute posed an obvious and unreasonable risk.

Amici's other central argument is that this Court should apply a heightened deliberate indifference standard in the specific area of prisoner safety. (Amici Brief at 9-14.) This argument, however, is foreclosed by *Wilson*, which explicitly stated that the same deliberate indifference standard applicable to medical claims and other conditions of confinement applies to failure to protect claims. *Wilson*, 111 S. Ct. at 2327.[14]

Amici's claim that many prisons are dangerous is true. (Amici Brief at 24-25.) But petitioner readily concedes that not every prison assault amounts to a constitutional violation. Rather, a violation will be found only where the objective and subjective components of an Eighth Amendment violation are satisfied. That constitutional

[14] Indeed, the Court cited failure to protect cases in reaching that conclusion. *Wilson*, 111 S.Ct. at 2327 (citing *Morgan v. District of Columbia*, 824 F.2d 1049 (D.C. Cir. 1987)); *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir.), *cert. denied*, 488 U.S. 823 (1988).

violations are frequent, if true, would support vigorous enforcement of the Constitution. It ought not alter the standard by which such violations are judged.

Finally, it is not true, as amici argue, that adoption of petitioner's standard would work a "radical transformation" in the meaning of deliberate indifference. (Amici Brief at 25.) In fact, the opposite is true: a "radical transformation" would occur only if this Court were to adopt the criminal standard that amici advance. As set forth in petitioner's opening brief, and challenged by neither respondents nor amici, the great majority of lower courts to consider the issue have in fact employed the deliberate indifference standard urged by petitioner. (*See* Petitioner's Brief at 36.)

V. THIS CASE MUST BE REMANDED

Respondents concede that evidence that a risk is obvious may be introduced to show that respondents knew of the risk. Petitioner's discovery request, which was denied by the district court, was designed to develop evidence of the level of violence at Terre Haute. This information, known to respondents but not to petitioner, was directly related to whether the risk faced by petitioner at Terre Haute was or was not obvious. (*See* Petitioner's Brief at 8-9.) Thus, under either the standard urged by petitioner or respondents, the court's failure to allow the discovery calls for reversal of summary judgment.

Moreover, there was ample evidence in the record, not considered by the district court, that respondents actually knew of the risk facing petitioner; the respondents' bald statements otherwise, which are significantly undercut by the record, cannot be dispositive.[15] For example, the

[15] Respondents argue that they "either denied personal knowledge that petitioner would be subjected to an increased danger as a result of his transfer, denied responsibility for the transfer or both." (Respondents' Brief at 26.) The record does not support this statement. For example, respondent Brennan did not address

the district court failed to consider respondent Edwards' declaration in a prior case that he believed that petitioner could not be safely placed in general population at another Bureau of Prisons maximum security facility. *Farmer v. Carlson*, 685 F. Supp. 1335, 1342 (M.D. Pa. 1988). Nor did the district court consider the finding in that case that "clearly, placing [Dee Farmer], a twenty-one year old transsexual, into the general population at Lewisburg, a Level Five security institution, could pose a significant threat to internal security and to plaintiff in particular." *Id.*[16]

Respondents argue that the transfer of petitioner to USP-Terre Haute was based on respondents' "good faith judgment." (Respondents' Brief at 21.) The record does not support that characterization. The single most distinctive fact about petitioner is undoubtedly her transsexual status; indeed, the record is full of references to her transsexuality. However, neither respondent Kurzydlo's disciplinary transfer memorandum nor the accompanying "comprehensive" progress report[17] contains a single reference to petitioner's transsexual status or possible risks she faced at USP-Terre Haute. The progress report notes the repeated periods of administrative detention at FCI-Lewisburg and other institutions, but does not refer to petitioner's transsexual status, which was the apparent reason for confinement in administrative segregation at those other institutions. Thus, the progress report gives the erroneous impression that this confinement may have been to protect the safety of others, not to protect petitioner. This impression is further supported by the fact that respondent Kurzydlo sought to transfer petitioner to USP-Leavenworth, a higher security facility than USP-Terre Haute. (*See* Kurzydlo Declaration, J.A. at 16-17.) The record suggests that prison officials may have considered petitioner both annoying[18] and litigious. The failure to mention her transsexuality, together with the implicit suggestion that she presented a risk to the safety of others, could have been motivated by the belief that such a presentation was likely to result in greater punishment of petitioner by leading to her transfer to USP-Leavenworth. In fact, if the transfer memorandum and progress report had explictly noted the risk posed by petitioner's transsexuality, this would be a different case. It would not be a case about whether the respondents lacked actual knowledge of the risk, but rather a case about the appropriate response to a known risk. Instead, the transfer memorandum and progress report

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whether he knew of the risk, and he affirmatively indicated his personal involvement in signing the transfer order. (*See* Petitioner's Brief at 40 n.56.)

Respondents also argue that they could not have known of the risk in Terre Haute general population. This argument is inconsistent with the declarations of respondents Kurzydlo and Smith averring affirmative knowledge of conditions at Terre Haute. (Kurzydlo Declaration, J.A. at 17 ¶ 9; Smith Declaration, J.A. at 11 ¶ 4.)

[16] Respondents suggest that petitioner's previous request to be placed in general population housing in *Farmer v. Carlson*, 685 F. Supp. 1335, 1342 (M.D. Pa. 1988), undercuts her claim in this case. (Respondents' Brief at 20 n.11.) Petitioner sought *safe* general population confinement at Lewisburg. She never indicated that she was waiving her right to personal safety, although she may well have been mistaken about how safe she would be in general population at Lewisburg. Respondents' reference to this prior lawsuit highlights the central weakness of their proposed standard: it shifts to prisoners the responsibility for making appropriate placement decisions. In any event, the federal court in that case agreed with the arguments of the Bureau of Prisons that petitioner's safety required administrative segregation. *Id.*

[17] *See* Transfer Report, J.A. 24-31; *see also* Response to Interrogatories, J.A. at 36.

[18] The disciplinary offense that led to the transfer recommendation involved credit card fraud in the prison. The disciplinary hearing officer's report refers to "[p]reviously imposed sanctions for similar offenses [that] have failed to effect a positive change in inmate Farmer's institutional behavior and attitude." (Disciplinary Hearing Officer's Report, J.A. 22.)

inexplicably lack any reference to the risk to petitioner as a transsexual.[19]

Respondents also argue that summary judgment was appropriately granted on the issue of personal responsibility. While the record is fundamentally undeveloped on issues related to the respondents' personal responsibility, the record demonstrates that they in fact had the power to recommend that petitioner be housed in administrative segregation at Terre Haute: after the rape, and for reasons unrelated to it, the FCI-Oxford and North Central Region staff did make a recommendation for segregated confinement at Terre Haute, which was implemented. (*See* Edwards Declaration, J.A. at 94-95.) It is certainly likely that further development of the record on remand will show that whether a particular person is placed in general population or protective custody is generally determined by the recommendations and information accompanying the transfer dossier. Moreover, the district court did not even address the personal responsibility issue in its opinion granting summary judgment. Accordingly, this Court should remand this case for full development of the record on this issue.[20]

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[19] Another question that remains unanswered by this record is why respondents did not make the recommendation for administrative segregation at Terre Haute at the time of transfer, rather than one day after petitioner's rape. Certainly the information that petitioner was, according to respondents' records, a sexually active HIV-positive prisoner makes the risk of placing her in general population at USP-Terre Haute even more apparent.

[20] As discussed in the text, the issue of the current respondents' personal involvement in the events at issue remains undeveloped in the record. Nonetheless, upon remand, it may well be that the district court will be asked to consider allowing the joinder of additional defendants. Petitioner was unrepresented by counsel when she prepared and filed the pleadings and legal memoranda in this case. As a *pro se* litigant, petitioner's legal work is necessarily subject to a less stringent standard than formal pleadings prepared by attorneys. *See Haines v. Kerner*, 404 U.S. 519 (1972). Moreover, the fact that there may be additional potential defendants does not prove a lack of personal responsibility on the part of these defendants.

Finally, respondents argue that the defendants sued in their official capacity, and therefore liable only for prospective injunctive relief, are no longer liable because petitioner's request for injunctive relief was mooted by her assignment to administrative detention. (Respondents' Brief at 28-29.) This position is erroneous. Despite respondents' suggestion otherwise, petitioner has since been transferred out of administrative detention into general population at FCI-Florence, a medium security facility.[21] Indeed, petitioner continues to be at risk of inappropriate classification in Bureau of Prisons facilities, placing her in danger of future assault by other prisoners. Moreover, subsequent remedial actions by prison officials do not automatically foreclose a prisoner's opportunity for injunctive relief without a factual determination by the district court as to the risk of future harm. *Helling v. McKinney*, 113 S.Ct. at 2481. In *Helling*, the plaintiff had been moved to another facility and thus was no longer the cellmate of a five-pack-a-day smoker, and the state prison system had adopted a smoking policy that restricted smoking to specifically designated areas. Notwithstanding the changed circumstances, this Court remanded the case to provide an opportunity to the plaintiff "to prove that he will be exposed to unreasonable risk with respect to his future health or that he is now entitled to an injunction." *Id.* at 2482. Similarly, in this case, the petitioner alleges a continued threat to her safety.

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[21] The Bureau of Prisons regulations cited by respondents (Respondents' Brief at 28 n.13), to support the argument that petitioner's case is moot call for discretionary, rather than mandatory, segregation: "[T]he [Bureau of Prisons] *may* place in controlled housing status an inmate who tests HIV positive when there is reliable evidence that the inmate may engage in conduct posing a health risk to another person." 28 C.F.R. § 541.60 (1992) (emphasis added). Accordingly, even if petitioner were housed in administrative detention, she could be moved at any time.

CONCLUSION

For the above reasons, petitioner urges the Court to reverse the decision of the court of appeals affirming the grant of summary judgment to the respondents, and to remand to the district court for trial.

Respectfully submitted,

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